IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 9264 OF 2004

SOU. KALINDI PRABHAKAR AMBEKAR & ORS. ... PETITIONERS

Versus

ABDUL RAHEMAN HAJI ABDUL GAFUR
(Since deceased) through his Lrs.
Jiyaurraheman Abdul Raheman & Ors. .. RESPONDENTS

Mr. N.V. Bandiwadekar for petitioners

Mr. A. N. Mulla for respondents

CORAM:-SMT. RANJANA DESAI, J.

DATED:-7-3-2005

P.C.

The petitioners are original defendants 2, 4, 7 and 8. Respondents 1 and 2 (for convenience the "plaintiffs") filed a suit against the defendants on the ground of arrears of rent, permanent construction, unlawful subletting and bonafide and reasonable requirement.

2. The trial court decreed the suit on the ground of arrears of rent and on the

ground of unlawful subletting. An appeal was carried from the said judgment and decree. The lower appellate court confirmed the decree on the ground of arrears of rent and unlawful subletting. Being aggrieved by the said concurrent finding, the defendants have approached this court.

3. I have heard Mr. Bandiwadekar, learned counsel appearing for the petitioners. He firstly contended that the plaintiffs had earlier filed R.C.S. No. 155 of 1973 simplicitor for arrears of rent. He submitted that in that suit no possession was sought on the grounds of arrears of rent. Even the ground of unlawful subletting was not urged. He drew my attention to the first notice dated 20/11/1972 and pointed out that by that notice the plaintiffs had asked for possession of the suit premises. However, the trial court has wrongly observed that in the notice issued prior to the filing of the suit possession was not demanded. The learned counsel contended that therefore, trial court's reasoning is perverse.

4. The learned counsel then contended that in the second notice dated 27/7/1974 the plaintiffs took up all the grounds. The learned counsel contended that in the first suit though grounds were available the plaintiffs did not ask for possession on the grounds of arrears of rent and unlawful subletting. The plaintiff did not take leave of the court as provided under Order II Rule 2 of the Code of Civil Procedure and hence the present suit must fail. Mr. Bandiwadekar contended that the courts

below have not appreciated this legal position.

5. The learned counsel further urged that the lease was for 50 years. Admittedly there was no forfeiture clause in the lease. In the absence of forfeiture clause the plaintiffs could not have filed the suit for eviction of tenants during the subsistence of lease. In this connection learned counsel relied on **Modern Hotel, Gudur v. K. Radhakrishnaiah & Ors.**, A.I.R. 1989 S.C. 1510. He, therefore, urged that this is a case which merits interference by this court in its writ jurisdiction.

6.I am unable to agree with the learned counsel. So far as unlawful subletting is concerned it is pertinent to note that as per the lease deed under which the suit site was let out to the grandfather of defendants 1 to 4, the tenant was to construct a structure and use it for his own business. However, in breach of the said condition original tenant allowed defendants 5 to 8 to run the cinema theatre and soda -water and pan shop in the building constructed on the suit site. In his written statement defendant 8 has admitted that he has taken the shop on rent. DW 1 Prabhakar father of defendants 1, 3 and 4 has also admitted that shops are in possession of defendants 7 and 8. The earlier litigation between the original tenant and defendants 5 and 6 also assumes importance. The compromise decree in R.C.S. No. 420 of 1964 shows that the original tenant had entered into an agreement with defendants 5 and 6 on 28/11/60 and the possession of the

theatre was given to them. Defendants 5 and 6 had agreed to pay Rs.1400/- per month. Therefore, case of subletting is clearly made out. Section 108 (o) of the Transfer of Property Act is attracted to this case.

7.It was argued that since there is no forfeiture clause in the lease deed, the suit for eviction of the tenant on the ground of breach of covenants of the lease deed is not maintainable. Reliance was placed on **Modern Hotel's case (supra)**. In that case the lease was for a period of 30 years. It was to expire in September, 1999. The lease deed did not stipulate forfeiture clause. The landlord initiated action for eviction of tenant on the ground that the tenant had failed to pay rent even though lease period had not expired. It was held that in the absence of forfeiture clause in the lease leading to termination by forfeiture, the contractual tenancy was subsisting under the provisions of Transfer of Property Act and there could not be any eviction from such a tenancy.

8.In this connection both the courts have referred to the suit for partition filed by Majarunnisa, neice of Abdul Kader for partition and possession of property including the suit site which is let out by Abdul Kader in favour of grandfather of the defendants. To that suit original tenant was a party. The lease deed was challenged in the said suit. In that suit the court declared that Abdul Rehman the original plaintiff was a minor at the time of the lease deed and hence it was not binding on him. Preliminary decree was passed.

Preliminary decree was modified by the High Court and the original tenant i.e. defendant 3 was directed to deliver vacant possession of 2/3rd share from the suit site to Abdul Kader. Thereafter final decree was drawn. Shares were demarcated and Abdul Kader and Abdul Rehman were allowed to take their respective shares. The contractual tenancy came to an end. In view of this , the judgment in **Modern Hotel's case (supra)** is not applicable to the present case.

9.It was then argued that the suit is not tenable because leave under Order II Rule 2 was not taken. It is true that in the earlier suit there was merely a prayer of arrears of rent. Possession was not sought. It is also true that the ground of subletting was not taken as ground. But it must be noted that the decree passed in the earlier suit has not been challenged by the defendants. Though the suit was decreed the defendants failed to pay the rent, hence the plaintiffs sent notice dated 27/7/1974 stating therein that despite the decree passed in the earlier suit the arrears were not paid. In that notice the plaintiff also took up the ground of subletting. It is in these peculiar circumstances that the plaintiff had to resort to the instant suit on the ground of arrears of rent till the date of notice and on the ground of subletting. The accrued arrears of rent after the earlier decree give rise to a fresh cause of action. Besides in the peculiar facts and circumstances of the case it cannot be said that the plaintiff had intentionally relinquished any portion of his claim. This

submission of the learned counsel for the petitioner must therefore, be rejected.

10. At this stage Mr. Bandiwadekar, learned counsel for the petitioners says that the ad-interim relief granted may be extended by eight weeks as the petitioners want to challenge this order in the Supreme Court. Mr. Mulla, learned counsel for the respondents opposes this. In the circumstances of the case, the ad-interim relief granted is extended by six weeks, on the petitioners filing the usual undertaking in this court within a period of four weeks from today, that in the event of their not getting any favourable order from the Supreme Court they will hand over vacant, unencumbered and peaceful possession of the suit premises to the respondents.

11. Certified copy expedited.

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